(3)

No. 90-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT D. GILMER,
Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 87 national and international labor organizations with a total membership of approximately 18,000,000 working men and women, is filed with the consent of the parties, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The litigants in this case have proceeded, both here and in the lower courts, on the assumption that petitioner's contract comes within the coverage of the United States Arbitration Act, 9 U.S.C. §§ 1-14. On that assumption,

the central legal problem in a case such as this one becomes whether the USAA requires arbitration of petitioner's federal statutory Age Discrimination in Employment Act ("ADEA") claim, or whether, instead, the ADEA incorporates a preclusion of the enforcement of prospective arbitration agreements.

There is, however, a logically prior issue that the parties to this case have not addressed: *The USAA expressly exempts certain types of contracts from its coverage.* The contract in question here may well be within that exclusion. Specifically § 1 of the Arbitration Act states:

> Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce [9 U.S.C. § 1]

Since the contract at issue in this case is one for employment, the question arises whether USAA § 1 takes that contract outside the Arbirtration Act's coverage entirely. If so, then the problem of how to reconcile the USAA and the ADEA does not even arise.

This brief is devoted to exploring the scope of the USAA exclusion for "contracts of employment," and takes no position upon the ADEA issue discussed by the parties. Our contention is that this Court need never reach that latter issue because, under the exclusion stated in USAA § 1, essentially *all* employment contracts, including the one in this case, are exempted from the Arbitration Act's coverage. This conclusion is inescapable, we believe, upon careful examination of the Act's language, structure, and legislative history—an examination which, despite the Act's venerable age, has not been undertaken by this Court or the lower courts.[1]

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[1] We acknowledge at the outset that because the parties have not questioned the USAA's application to this case, and the issue was not raised as a Question Presented in the Petition for Writ of Certiorari, the Court may feel constrained to pretermit the coverage issue and proceed on the assumption that the USAA applies. If the Court chooses to proceed in this fashion, we urge that the opinion make clear that the applicability of the Arbitration Act is assumed only because no coverage issue was properly presented for review. *See NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542, 1550 n.8 (1990) (Court decided a question concerning the proper application of a basic legal standard developed by the National Labor Relations Board, but expressly reserved the threshold issue of whether that standard is a valid one); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (Court decided which state limitations period to borrow for a federal cause of action, expressly reserving the question whether, instead, a uniform federal limitations period derived from the NLRA is applicable).

Express recognition of the coverage issue is particularly important in light of this Court's decision in *Perry v. Thomas*, 482 U.S. 483 (1987). In *Perry*, the Court held that the USAA preempted a California statute authorizing civil actions for the collection of wages, despite an agreement to arbitrate. The particular contract at issue there was also an employment contract in the securities field. The parties apparently did not brief the issue whether the contract fell within the exclusionary clause of USAA Section 1, and the Court did not address the issue. Nonetheless, Perry's silence on the coverage question has led the lower courts to assume, without examination, the applicability of the Arbitration Act to contracts of employment in the securities industry. *See, e.g., Brown v. Merrill Lynch, Pierce, Fenner & Smith*, 664 F. Supp. 969, 971 (E.D. Pa. 1987) (citing *Perry* and applying Arbitration Act to employment contract involving stock broker). A second decision by this Court which similarly assumes, without discussion, the applicability of the Act would doubtless have the effect of further deterring litigants and the lower courts from giving careful consideration to the scope of the exclusion provision, a result we doubt this Court intended by its silence in *Perry*.

In the argument that follows, we survey the two major issues that have arisen in the lower courts with regard to the scope of the USAA exclusion for contracts of employment: whether "contract of employment" refers only to individual employment contracts, or to collective bargaining agreements as well; and whether the exclusion applies to all contracts of employment that would otherwise be covered by the Act, or only to those in the trans-

portation industry. The first issue is not directly implicated in this case, since the contract involved is an individual one; nonetheless, the litigation and legislative history of the "contract of employment" exclusion largely concerns collective bargaining agreements, so that some attention to the first question is helpful in framing the problem presented here. The second issue, on the other hand, could be determinative of this case.

1. The question whether or not collective bargaining agreements are covered by the contracts of employment exclusion was widely litigated in the federal courts in cases concerning the enforceability of arbitration clauses in collective bargaining agreements, with conflicting results, before this Court's opinion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). The question was fully briefed to this Court in *Lincoln Mills*, as an alternative to the question concerning the meaning and effect of § 301 of the Labor Management Relations Act, 29 U.S.C. § 301 that this Court actually decided. Justice Frankfurter in dissent read the Court's silence on the USAA question as indicating that collective bargaining agreements are not covered by the Arbitration Act. Similarly, every federal court of appeals case since *Lincoln Mills*, and this Court in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), have understood collective agreements to be contracts of employment for purposes of the USAA exclusion. Pp. 7-9, *infra*.

2. The seminal case on the second primary question raised by the USAA exclusionary clause is *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1952) (*en banc*), holding that the clause only applies to the employment contracts of workers who directly transport goods in interstate commerce.

(a) *Tenney* held, first, that the "engaged in commerce" language of the exclusionary provision is to be read as narrower than the "transaction involving commerce" ter-

minology that describes the USAA's affirmative coverage. This approach disregards the different syntactical context in which "involving commerce" and "engaged in commerce" appear; is inconsistent with an opinion of this Court which read the two phrases interchangeable; and, most important, would lead to a seriously anomalous result, leaving within the statute only those employment contracts which *least* implicate the Commerce Clause concerns that justify the statute in the first place. Pp. 10-14 *infra*.

(b) *Tenney* also indicated that the exclusionary language should be read as limited to the transportation industry because the two specific examples in the clause, seamen and railroad workers, are in that industry, and work in jobs covered by federal statutory schemes establishing arbitration mechanisms. This analysis must fail as well: Many transportation industry employees are *not* covered by any special federal statute concerning arbitration, nor is there any reason why Congress would *exclude* from an arbitration enforcement statute only those few industries as to which the federal government had evidenced a special preference for arbitration. Finally, the key statutory interpretation question, in any event, is not the precise scope of the exclusionary language, but whether the scope is *narrower* than the Act's affirmative coverage of transactions "involving commerce," a question which the particular examples used in the exclusionary provision are of no help in answering. Pp. 15-16 *infra*.

(c) Finally, *Tenney* was also incorrect in asserting that the legislative history of the USAA is of no aid in defining the scope of the Act's coverage in the realm of empolyment contracts. To the contrary, as we demonstrate by reviewing the legislative materials, that history makes abundantly clear that Congress did *not* intend to cover *any* contracts of employment in the Arbitration Act, but meant to affect only commercial contracts. Pp. 16-24 *infra*.

ARGUMENT

At the time of the enactment of the United States Arbitration Act, the common law prohibited judicial enforcement of agreements to arbitrate, leaving the business community with no enforceable means of settling disputes other than through litigation. The Arbitration Act was passed in response to the urgent need for a less costly and time-consuming means of resolving *commercial* disputes.

Consistent with that focus, the Act applies to "any maritime transaction or a contract evidencing a transaction involving commerce" (USAA § 2, 9 U.S.C. § 2), except that "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are not covered by the statute (USAA § 1, 9 U.S.C. § 1).

In interpreting the reach of the exclusionary language of § 1 of the Arbitration Act, two major issues have been widely litigated in the lower courts:

Whether the exclusionary language refers to all employment-related contracts, including collective bargaining agreements, or only to individual employment contracts;[2] and whether the exclusion applies to all employment contracts otherwise covered by the statute, or only those concerning employees directly involved in the movement of goods between states and countries.

Only the second of these two issues is directly implicated in this case. Answering that question, however, requires some attention to the first question as well, because much of the case law concerning the "engaged in commerce" question arises in the collective bargaining agreement con-

[2] It has never been suggested, to our knowledge, that the exclusionary clause might cover collective bargaining agreements but not individual employment contracts such as the one in this case, nor can we see any basis for perceiving such a distinction in the statute.

text, and because the legislative history pertinent to the "engaged in commerce" question also largely involves the collective agreement situation. We therefore begin with a brief detour, in order to demonstrate that collective bargaining agreements are outside the Arbitration Act's coverage to the same extent as are individual employment contracts. We then turn to the question as actually raised by this case, and show that the USAA's language, structure, and history all indicate that the Act's provisions were not intended to apply at all in the employment context.

(1) *"Contracts of Employment"*: Given the words of USAA § 1, it has never been doubted that the Act's exclusion clause refers to *individual* contracts of employment such as the one in this case.[3] There have been, however, questions raised in the past as to whether or not that term covers collective bargaining agreements.

As of 1956, three Circuits had held that the Arbitration Act's exclusion clause refers to collective bargaining agreements and that such agreements are therefore outside the statute. *Amalgamated Assn. v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3d Cir. 1951); *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954); *Lincoln Mills v. Textile Workers Union*, 230

[3] At least one case did suggest that the reference to "workers" in the exclusionary clause language indicates that employment contracts for certain management positions may not be included. *Bernhardt v. Polygraphic Co. of America*, 218 F.2d 948 (2d Cir. 1955). The statute, however, contains no definition of "worker," and this Court expressly declined to reach the question whether the exclusion is thus limited by affirming the USAA aspect of the Second Circuit's opinion in *Bernhardt* on other grounds. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201 n.3 (1956). Whether or not the plaintiff in this case, a manager of financial services, would be a "worker" under the interpretation of the Second Circuit in *Bernhardt*, would turn in the first instance on a full development of the facts which, it appears, has not yet occurred in this case.

F.2d 81 (5th Cir. 1956), *affirmed*, 353 U.S. 448 (1957). At least two circuits—in an effort to find some statutory basis for enforcing arbitration clauses in collective bargaining agreements that did not present the constitutional problems theretofore thought to lurk in § 301 of the Labor Management Relations Act, 29 U.S.C. § 301—had held otherwise. *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956), *affirmed on other grounds*, 353 U.S. 547 (1957); *Hoover Motor Express Co. v. Teamsters Union*, 217 F.2d 49, 52-53 (6th Cir. 1954).

The application of the USAA exclusionary clause to collective bargaining agreements was therefore one of the issues raised in the petitions for writs of certiorari and discussed at great length in the briefs in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1947) and its companion cases (*see, e.g.*, Brief for the Petitioner in *General Electric Co. v. Local 205, United Electrical Workers*, Oct. Term 1956 No. 276, at 10-30; *id.*, Brief for the Respondent at 43-55).

The opinions for the Court, however, did not address the issue at all. Instead, the Court resolved both the enforceability of arbitration clauses in collective bargaining agreements and the constitutional issues thought to inhere in LMRA § 301 by holding that § 301, standing alone, permits the enforcement of arbitration clauses through the substantive creation of a federal common law of labor agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. at 449-57; *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957); *General Electric Co. v. Local 205, United Electrical Workers*, 353 U.S. 547 (1957).

In dissent, Justice Frankfurter perceived a "rejection though not explicit, of the availability of the . . . Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion." *Textile Workers v. Lincoln Mills*, 353 U.S. at 466 (Frankfurter, J., dissenting).

The lower courts have also read this Court's opinion in *Lincoln Mills* as indicating that collective bargaining agreements are indeed "contracts of employment" within the meaning of the exclusionary provision. *See, e.g., American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 471-72 (11th Cir. 1987). As far as we are aware, every circuit in which the issue has arisen currently adheres to the view implicit in the *Lincoln Mills*—that collective bargaining agreements are "contracts of employment" within the meaning of the USAA exclusion.[4]

Moreover, in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), a case concerning the enforcement of an arbitration clause in a collective bargaining agreement, the Court stated that "[t]he [United States] Arbitration Act does not apply to 'contracts of employment' . . . but the federal courts have often looked to the Act for guidance in labor arbitration cases . . . ." *Id.* at 40 n.9.

After *Misco*, there can be little doubt that USAA's exclusionary clause refers to collective bargaining agreements as well as individual contracts of employment.[5]

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[4] *See United Food & Comm. Workers v. Safeway*, 889 F.2d 940, 944 (10th Cir. 1989); *Posadas de Puerto Rico v. Asociasion de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Occidental Chemical Corp. v. International Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988); *see also Bacashihua v. United States Postal Service*, 859 F.2d 402, 404-05 (6th Cir. 1988); *American Postal Workers Union v. United States Postal Service, supra* (11th Cir. 1987); *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 488 (1st Cir. 1983); *International Union of Electrical Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 889 (5th Cir. 1983); *American Postal Workers Union v. U.S. Postal Service*, 861 F.2d 211 (9th Cir. 1988); *Service Employees Int. Union v. Office Center Services*, 670 F.2d 404, 406-07 n.6 (3rd Cir. 1982); *Sine v. Local No. 992, Teamsters*, 644 F.2d 997, 1001-02 (4th Cir. 1981); *Pietro Scalzitti Co. v. International Union of Operating Engineers*, 351 F.2d 576 (7th Cir. 1965).

[5] Although the legislative history of the USAA employment exclusion is discussed below as to a different point, we believe that

(2) *"Engaged in Interstate or Foreign Commerce"*: Aside from the coverage of collective bargaining agreements issue, the other major controversy that has arisen under the USAA "employment contracts" exclusion, and the one of direct pertinence to this case, is whether the exclusion refers only to employment contracts of employees directly involved in the *movement* of goods in foreign and interstate commerce, and is, on that ground, an exclusion applicable to a narrow range of circumstances.

The most fully reasoned and widely cited lower opinion taking this view is the Third Circuit's 1953 decision in *Tenney Engineering, Inc. v. Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1952) (*en banc*); the remaining cases taking a limited view of the reach of the USAA employment contract exclusion simply cite *Tenney* or a decision that summarily relies on *Tenney*.[6] It is therefore appropriate in beginning an inquiry concerning the propriety of this reading of USAA's exclusionary clause to examine the Third Circuit's reasoning in *Tenney*.

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that same history also confirms that, as the post *Lincoln Mills* cases uniformly held, collective bargaining agreements are within the USAA exclusion to the same degree as are individual employment contracts.

[6] *Tenney* did not create a uniform following at the time, *see e.g. United Electrical Workers v. Miller Metal Products, Inc., supra*; *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957), and has gradually lost some of its initial influence, even within the Third Circuit, *see e.g. Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969); *Service Employees Int. Union v. Office Center Services, supra*, 670 F.2d at 406-07 n.6 (declaring the "advancing lifelessness of the Act in labor arbitration").

It is still true, however, that a number of courts have followed *Tenney* and its progeny, and held that the USAA's exclusion clause is intended to exempt only those workers directly involved in the *transportation* industry. *See, Signal-Stat Corp. v. Local 476, United Electrical Workers*, 235 F.2d 298, 302 (2d Cir. 1956); *Pietro*

Focussing on the second half of the Arbitration Act's exclusionary clause ("seamen, railroad employees, or any other class of workers engaged . . . in commerce"), *Tenney* read the "engaged in commerce" language extremely narrowly, to refer only to those workers who are directly engaged in the transportation of goods. 207 F.2d at 451-53. In support of this restrictive interpretation, *Tenney* pointed to (a) the narrow understanding of the term "engaged in commerce" at the time the USAA was passed in 1925, and (b) the fact that the two classes of workers referred to expressly (seamen and railroad employees) are in the transportation industry, and were covered at the time by federal statutes providing some mechanism providing for the arbitration of employment disputes.

(a) The problem with the first part of the *Tenney* analysis is that *Tenney* ignores the portion of the Arbitration Act setting out its *affirmative* coverage.[7] As noted,

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Scalzitti Co. v. Operating Engineers, 351 F.2d 576 (7th Cir. 1965); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2nd Cir. 1972); *Stokes v. Merrill, Lynch, Pierce, Fenner & Smith*, 523 F.2d 433, 436 (6th Cir. 1975); *Miller Brewing v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Tonetti v. Shirley*, 173 Cal. App. 3rd 1144, 1148 (1985).

Other courts have expressly left open the Tenney issue. *See, American Postal Workers Union v. United States Postal Service, supra*, 823 F.2d at 473 (11th Cir.); *Bacashihua v. United States Postal Service, supra*, 859 F.2d at 405 (6th Cir.).

Yet other cases, some in the same circuits as those that have applied the *Tenney* distinction, have assumed the applicability of the USAA exclusionary clause to contracts that would not meet a transportation limitation, without discussing the question. *See, United Food & Comm. Workers v. Safeway*, 889 F.2d 940, 944 (10th Cir.); *Posadas de Puerto Rico v. Asociacion de Empleados, supra*, (1st Cir.); *see also Derwin v. General Dynamics Corp., supra*, (1st Cir.).

[7] The reason *Tenney* did not do business with the affirmative statutory coverage in considering the scope of the exclusion was that the Third Circuit was of the view that the limitation on the

USAA § 2 provides that the statute as a whole applies to "any maritime transaction or a contract evidencing a transaction *involving commerce.*" *See Bernhardt v. Polygraphic Co., supra*, 350 U.S. at 201; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).

Consequently, the key statutory question is not whether the term "engaged in commerce" in USAA § 1 is broad or narrow *in the abstract*, but whether the reference to employment contracts for employees "engaged in commerce" is broader, is narrower or is coextensive with the "transaction[s] involving commerce" that come within the statute's affirmative coverage.

If the affirmative and exclusionary references are parallel, and both are narrow, then while, as the *Tenney* court held, most employment contracts will not be excluded by virtue of the exemption in USAA § 1, those same contracts will fall outside the Act's affirmative coverage and the ultimate result will be the same: The USAA is deemed to be inapplicable. *Cf. Bernhardt v. Polygraphic Co., supra*, 350 U.S. at 201 & n.3 (no reason to construe the exclusionary clause because there is no evidence that the employment contract in question was one "evidencing a transaction involving commerce.")

If on the other hand, both references in the statute to "commerce" are similarly broad, the affirmative coverage question would ordinarily not arise with respect to employment contracts, because most such contracts would be excluded by USAA § 1.

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affirmative reach of the Act ("involving commerce") did *not* apply to § 3, the provision at issue in that case, and that, instead, *all* contracts came within the purview of § 3 regardless of their connection to interstate commerce. Thus, after concluding that the employment contract at issue did not fall within the exemption, the case was over. *Tenney's* view of the reach of USAA § 3 however, proved incorrect. *Bernhardt v. Polygraphic Co., supra*, 350 U.S. at 201.

The answer to the ultimate question whether any employment contracts are governed by the USAA rests or falls, therefore, on whether the affirmative coverage of the Act (*"involving commerce"*) is co-extensive with the reach of the § 1 exemption (*"engaged in commerce"*).

We note at the outset that the different syntactical contexts of the two references to "commerce" mean that use of precisely the same connective in the two circumstances would have created a grammatical problem: a "transaction" could not be said to be "engaged in" commerce, nor would a reference to a "class of workers" as "involving commerce" make sense. Thus, there is no necessary inference to be drawn from the simple fact that a different connective was used in the two contexts.[8] Indeed, this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra*, proceeds on the understanding that the terms "engaged in commerce" and "involved

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[8] Moreover, it would be ahistorical to suppose that Congress used the very similar terms "involving commerce" and "engaged in commerce" as evidencing a fine-cut distinction in 1925:

> Today Congress probably uses [phrases such as "affecting commerce," "engaged in the production of goods for commerce" and "engaged in commerce"] as words of art, but it is hard to believe that they were so understood in 192[5] long before such precise distinctions were introduced by the Court. At that time, no one supposed that there was federal power to regulate employment relations in industries producing goods for commerce or industries affecting commerce, and the phrase "any other class of workers engaged in interstate or foreign commerce" might well have been considered broad enough to reach every contract of employment subject to federal regulation. [Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 597-98 (1954) (footnote omitted).]

See also *United States v. American Building Maintenance*, 422 U.S. 271, 279-280 (noting that the term "in commerce" had acquired a particular meaning by 1950, but indicating that before the 1930's this was probably not the case). *See also id.* at 276 (even the contemporary meaning of "in commerce" includes not only the transportation and distribution of goods but also "the practical,

in commerce" *were* meant to be co-extensive.[9] In that opinion the Court repeatedly used the two terms interchangeably, thus indicating that little hinged on Congress' decision to use slightly different terms in the affirmative and negative sections of the Arbitration Act.[10]

Moreover, interpreting "engaged in commerce" to be narrower than "involving commerce" would create the following paradoxical result: those employment contracts *most* involving interstate commerce, and most certainly within the Commerce Clause jurisprudence of the day (i.e. contracts in the transportation field), would fall *outside* the Act's coverage; those with *less* direct connection to interstate commerce—*viz.*, those as to which the constitutional authority of the day indicated that federal regulation was suspect—would fall *within* the Act's affirmative coverage and would not be exempt. Limiting coverage to those contracts the *least* evidently within the reach of the federal constitutional authority justifying federal regulation is so anomalous that this Court should not attribute such an intent to Congress without clear evidence pointing in that direction. *Public Citizen v. U.S. Dept. of Justice*, —— U.S. ——, 109 S. Ct. 2558, 2566 (1989).

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economic continuity in the generation of goods and services for interstate markets.").

[9] The issue in *Prima Paint* was whether the Act required arbitration of a claim where one of the parties had been fraudulently induced into entering into the contract requiring arbitration.

[10] *See e.g.* 388 U.S. at 401 (affirmative coverage of Act applies to contracts "evidencing transactions in commerce"); *id.* ("There could not be a clearer case of a contract evidencing a transaction *in* interstate commerce." (emphasis supplied)). If the Court attributed any significance to the distinction between workers "in" and transactions "involving" commerce, the Court presumably would not have quoted the language used in the affirmative coverage, substituting "in" for "involving." See also *id.* at 409, 410 & n.3 (Black, J., dissenting) ("involving commerce" is "carefully limited language," suggesting that "Congress did not intend to exert its full power over commerce.").

(b) *Tenney*'s second major basis for maintaining that most contracts of employment (including most collective bargaining agreements) are *within* the USAA's coverage —and that the exclusionary language is limited to employees directly involved in moving goods in interstate or foreign commerce—is that the exclusionary language refers to two particular classes of workers (seamen and railroad workers), that work in industries covered by federal statutes providing for the arbitration of employment disputes. This aspect of the *Tenney* analysis fares no better, upon examination, than the other.

For one thing, there is no necessary connection of the kind *Tenney* posits: Many workers directly involved in transporting goods—truck drivers, to take the most obvious example—are *not* in industries in which any special federal arbitration provisions exist, or existed in 1925. Secondly, this aspect of the *Tenney* analysis, as well, produces an anomalous result: Congress would be *excluding* from an Act providing for the enforcement of arbitration contracts, the very classes of workers who were most likely to be covered by congressionally endorsed systems for the arbitration of contractual employment disputes. At the same time, Congress would be *covering* by that Act other workers who were unlikely to be party to arbitration contracts, and as to whom Congress had to that point evidenced no interest in promoting the arbitration of contractual employment disputes. This turns the logic of the situation upside down.

Finally, as we have noted (p. 12, *supra*), the pertinent statutory construction question is not whether the exclusionary provision is broad or narrow, but whether the exclusion is broader than, narrower than, or coextensive with the affirmative coverage of the statute as far as the connection to commerce is concerned. The references to "seamen" and "railroad employer" in the exclusionary clause provide no basis for choosing between these possibilities.

To be sure, Congress *may* have included those particular examples because the Legislature intended to signify that only classes of workers most directly implicating Commerce Clause concerns were to be excluded, leaving contracts of employment for other workers within the Act. Equally plausible, however—and, indeed, more likely, given the anomaly created by reading the statute as *Tenney* suggests (*see* pp. 11-12, *supra*)—is the hypothesis that the classes of workers Congress named were those the legislature was certain were within the Act's affirmative coverage, but that for the very reasons that lead Congress to make that exclusion the legislature similarly intended to exclude any other classes of workers that might also be deemed to be within the Act's affirmative coverage.[11]

(c) *Tenney* was also in error in another respect: Although the Third Circuit in *Tenney* maintained that "the legislative history furnishes little light on [the statutory construction] point" (207 F.2d at 452), in fact any ambiguity lurking in the statutory language and structure with respect to the relative reach of the Act's affirmative "commerce" coverage and the "contracts of employment" exclusion is resolved by clear legislative history. That history, which has never been surveyed in full detail by this Court, or any other court,[12] establishes an evident intent to assure that *no* employment-related disputes would be subject to the Arbitration Act.

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[11] Another possibility is that Congress named the two classes of workers to negate any inference that the federal statute providing arbitration mechanisms with respect to those two groups indicated that Congress did *not* intend seamen and railroad employees to have the benefit of the more general exclusionary language.

[12] The history was, however, fully briefed to this Court in *Lincoln Mills* and its companion cases. Much of the account that follows in the text, indeed, follows the account presented to this Court by the Petitioner in *General Electric Co. v. Local 205, United Electrical Workers*, 353 U.S. 547 (1957).

The advocates of the Arbitration Act were concerned with overturning the rule then prevailing under both state and federal law which denied specific enforcement to arbitration agreements. The Act was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association, acting upon instructions from the Association to consider and report upon "the further extension of the principle of commercial arbitration." 45 A.B.A. Rep. 75 (1920).[13] In December 1922, the committee's draft of the federal act was simultaneously introduced as a bill in the Senate (S. 4214) and in the House (H.R. 13522). 64 Cong. Rec. 732, 797 (1922).

As it then stood, § 2 of the bill made valid and enforceable written "provisions for arbitration" in "any contract or maritime transaction or transaction involving commerce," while § 1 defined "commerce" but contained no exclusionary language. When the bill, in this form, came to the attention of Andrew Furuseth, President of the International Seamen's Union of America, he strongly objected to this "compulsory labor" bill and submitted the specific grounds for his condemnation in a lengthy analysis to his Union at its twenty-sixth annual convention. Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203 (1923).

Protests against the bill were also made by the American Federation of Labor ("AFL"). *See* Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925).[14] There is nothing to indicate that

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[13] A detailed history of the American Bar Association's efforts in this regard, not repeated here, is set forth at 50 A.B.A. Rep. 356-362 (1925).

[14] While the Seamen's Union, of course, was principally concerned with contracts covering its own members, contracts that would be outside the Act's coverage on any reading of the statute as actually passed, the AFL then, like the AFL-CIO now, included

labor's opposition was limited to the narrow range of labor contracts that would be excluded from the statute under the *Tenney* approach. Rather, as representatives of the Federation later explained, the basis for labor's objection to the bill was the fear that weak unions, or individuals, would be compelled to submit to arbitration clauses, and that the arbitral decision-makers would as a practical matter be under the control of the employers. See 53 A.B.A. Rep. 351-352 (1928).

This fear may seem hard to credit in light of later developments, especially the fact that the labor movement later became the principal supporter of enforceable arbitration under collective bargaining agreements. *See, e.g., Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The era in which the USAA was passed, however, was the heyday of labor concern with court interference in labor matters generally, and toward federal court injunctions against unions and employees particularly, concern which later led to the enactment of the Norris-LaGuardia Act. *See* F. Frankfurter & N. Green, *The Labor Injunction* (1930); 29 U.S.C. § 101 *et seq.* And specific incidents had arisen in the coal mining, building trades and other fields, in which adverse arbitration awards resulted in strikes. See E. Witte, *Historical Survey of Labor Arbitration*, 35-36 (1952).

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member unions in a broad range of industries. And, in fact, unions in many trades and industries, in addition to the seamen, had collective agreements containing arbitration clauses at the time. In the 1920s such provisions were prevalent, for example, in the collective agreements of the garment workrs, electrical workers, machinists and mine workers, teamsters, and boot and shoe workers. See 53 A.B.A. Rep. 359 (1928); Milles & Montgomery, *Organized Labor*, 708-713 (1st ed. 1945); E. Witte, *Historical Survey of Labor Arbitration*, 23-26 (1952); Oliver, *The Arbitration of Labor Disputes*, 83 U. of Pa. L. Rev. 206, 213-214 (1934)

Given these circumstances, strong labor opposition to a change which would have altered the common law rule and commanded enforcement of arbitration clauses and awards through court injunctions commanding specific enforcement was not surprising. *See, Amalgamated Association v. Pennsylvania Greyhound Lines*, 192 F.2d 310, 313, (3d Cir. 1951) (noting the "[w]idespread dissatisfaction with compulsion from the federal bench in labor disputes during the era in which the statute was passed" and stating that: "[f]or Congress to have included in the Arbitration Act judicial intervention in the arbitration of disputes about collective bargaining . . . would have created pointless friction in an already sensitive area . . . .").

Accordingly, at the hearing on the proposed Arbitration Act before the Senate subcommittee to which the bill had been referred, Mr. Piatt, Chairman of the American Bar Association's Committee on Commerce, Trade and Commercial Law, after referring to the objections of the Seamen's Union, took pains to make it clear that "[i]t was not the intention of this bill to make an industrial arbitration *in any sense*," (emphasis supplied) and added:

> . . . and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' *It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this. [Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 4213 and S. 4214, 67th Cong., 4th Sess. 9 (1923) (hereafter "Hearing") (emphasis supplied).]

Consistent with that pronouncement, Senator Sterling, the subcommittee Chairman, referred to the exclusionary clause proposed by Mr. Piatt as follows: ". . . your suggested amendment in regard to the labor associations; that they shall not be considered." *Id.* at 10.

Further, then Secretary of Commerce Hoover, in a letter to Senator Sterling, Chairman of the Senate Subcommittee, dated January 31, 1923, the day of the hearing, also proposed that an exclusionary clause, worded slightly differently from the one suggested by Mr. Piatt, be inserted. Hearing at 14. Secretary Hoover called attention to "[t]he urgent need of a Federal commercial arbitration act," and, in order to speed the passage of the bill by eliminating labor's objection in the broad field of "workers' contracts," suggested amending the Act by insertion of the present exclusionary language of USAA § 1. *Id.*

At the next session of Congress, the bill was reintroduced in both the House and Senate, but this time the first section of the bill contained the exclusionary language which had been proposed by Secretary Hoover, and which presently appears in USAA § 1. Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646 (hereafter "Joint Hearings") (68th Cong., 1st Sess.) (1924).[15] The subject matter of the committee hearing on the bills was described as "Arbitration of Interstate *Commercial* Disputes" (emphasis supplied) (*id.* at 1), and page after page of the printed record of this hearing reflects the commercial nature of the bill. Over seventy commercial organizations—trade associations, chambers of commerce and bankers' associations—which had endorsed the bill were present at the hearing.

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[15] Also, in the definition of "maritime transaction" in § 1, the words "seamen's wages", which had originally been included, were deleted.

In contrast, despite the earlier general opposition, *not* a single labor union appeared, nor was there any testimony or suggestion by anyone that the bill was intended in any way to apply to union or other employment agreements. Both the House and Senate reports on the bill are equally devoid of any indication that arbitration of labor disputes was in any way included. H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924); Sen. Rep. No. 536, 68th Cong., 1st Sess (1924).

On the floor of Congress, the sponsors of the legislation similarly pointed to the bill's commercial character. Congressman Graham, Chairman of the House Committee on the Judiciary, stated:

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.
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> * * * *
>
> It creates no new legislation; grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts. [65 Cong. Rec. 1931 (1924).]

And later, Congressman Mills of New York, who had intruced the bill in the House, said in response to a request for an explanation of its provisions:

> This bill provides that where there are *commercial* contracts and there is disagreement under the contract, the court can force an arbitration agreement in the same way as other portions of the contract. [65 Cong. Rec. 11080 (1924) (emphasis supplied).]

In short, throughout the history of the Act, the clearly expressed intention was to reach only commercial contracts; *no* labor agreements, in *any* industry, were to be covered.

The Arbitration Act was so understood both shortly after its passage, and for many years afterwards by the business, legal and labor interests that had been most concerned with its enactment. *Cf. Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294 (1933) (contemporary views of officials involved in a statute's enactment are entitled to particular respect.) For example, in 1925, the executive council of the A.F. of L., in referring to the Act in its annual report, stated:

> Protests from the American Federation of Labor and the International Seamen's Union brought about an amendment which provides that "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This exempts labor from the provisions of the law, although its sponsors denied that there was any intention to include labor disputes. [Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925).]

Similarly, events in the aftermath of the USAA's passage demonstrate that the exemption was understood to have removed *all* employment contracts from the Act's coverage. In 1926, one year after the Act's passage, the American Bar Association's Committee on Commerce, Trade and Commercial Law, which had drafted and sponsored the Act, began work upon a new bill which *would* apply in the labor field. Noting that "Congress has already enacted a statute providing a method for the settlement of commercial disputes by means of arbitration," the Committee stated that it was "convinced that a similar statute may properly be enacted by Congress providing for the settlement in like manner of industrial disputes . . ." 51 A.B.A. Rep. 394 (1926).

After two years, during which the Committee held public hearings and conferred extensively with representatives of business, labor and of government, the ABA submitted a draft of a bill, to make enforceable written agreements made "by an employer or organization of employers with an organization of employees" to submit to arbitration disputes "concerning terms of employment or conditions of labor." 53 A.B.A. Rep. 376 (1928) Pointing out that labor opposition, which had led to the exclusionary language in the Arbitration Act, had prevented "application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy" (*id.* at 351), the Committee stressed the necessity of taking account of this "state of mind on the part of the workers of the country" in any effort to frame a statute dealing with "arbitration of industrial disputes" (*id.* at 352).

Yet despite the Committee's sensitivity to these concerns, the ABA draft proposal proved to be unacceptable to labor. In 1929 President Green of the American Federation of Labor denounced the measure. 19 *American Federation of Labor Weekly News Services*, No. 5 (April 13, 1929). Accordingly, the Committee concluded, in 1930, that "public opinion is not yet ready for this legislation" and that "it would be a mistake to press it actively at the present time". 55 A.B.A. Rep. 328 (1930).

In 1942, the labor relations issue arose when a bill drafted by Professor Sturges, Chairman of the American Arbitration Association's law committee, to amend the Arbitration Act was introduced in the Senate (S. 2350, 77th Cong., 2d Sess.). 88 Cong. Rec. 2071. Among other things, the bill struck out the exclusionary language of § 1 of the Act and contained a new § 2A expressly covering the enforcement of arbitration agreements between labor organizations, or representatives of employees, and employers. In an explanatory statement accompanying the bill, it was stated that the purpose of the proposed amendment was "extension of the act to embrace written agreements to arbitrate labor controversies." 88 Cong. Rec.

2072 (1942).[16] The bill, however, was never reported by the Committee.

Thus, at the time of the enactment of the Arbitration Act, and for years afterwards, it was well understood that USAA § 1 removed all employment contracts from the Act's coverage. The sponsors of the Act and Congress were thinking exclusively of commercial "transactions": "The farmer who sells his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance." Joint Hearings, *supra*, at 7 (1924). The legislative history refutes the conclusion that only the narrow class of workers involved in the transportation industry were intended to be exempt from the Act's coverage.

In short, all the evidence points to the conclusion that Congress intended to exclude *all* employment contracts, individual and collective, within the transportation industry and throughout other industries, from the coverage of the Arbitration Act. Consequently, the decision below, which assumed that the Act applies generally to contracts of employment in the securities industry is wrong and should be reversed.

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[16] The statement continued:

> Just as the present act was designed to overcome the common law rules of "revocability" and "nonenforceability" of written agreements to arbitrate commercial controversies arising between the parties, so by section 2A, as proposed, would the act be extended to written agreements to arbitrate labor controversies. [*Id.*]

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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